Supreme Court, U.S.
FILED

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Supreme Court of the United States
OCTOBER TERM, 2000

S. EDWARD EMERY,

Petitioner,

-against-

CITY OF TOLEDO
(STATE OF OHIO)

Respondent.

AMENDED PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

S. Edward Emery, appearing *pro se*
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QUESTIONS PRESENTED

1. Whether it is a due process violation under the Fifth and Fourteenth Amendments to the United States Constitution, to convict and sentenced to defendant where the state has failed to offer evidence on, and the court has merely assumed, essential elements of the charged crime.

2. Whether enforcement of a Temporary Restraining Order was a violation of Petitioner's rights under the First Amendment to the United States Constitution, when the language of the order was so broad, vague, and subjective that it was left entirely in the hands of the complainant what behavior would be deemed forbidden under the order, and whether, as applied,

the restraining order alleged to have been violated was an unconstitutional prior restraint on lawful communications and/or political activity protected by the First Amendment.

3. Whether it is a due process violation under the fifth and fourteenth amendments to the United States Constitution, for the court to admit evidence which goes far beyond the scope of a bill particulars for the charged crime.

4. Whether it is a due process violation under the fifth and fourteenth amendments to the United States Constitution, for the court to sentence petitioner without offering him an opportunity for allocution at sentencing (and then sentence Petitioner to the maximum possible sentence of incarceration.)

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BASIS FOR JURISDICTION

On July 13, 2000, the Court of Appeals for the Ohio Sixth Appellate District affirmed the trial court's decision. This was the last written opinion in the case.

The judgment of the Ohio Supreme Court denying jurisdiction of the case was entered on November 22, 2000.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

PRAYER

Petitioner Edward Emery prays that this Honorable Court grant a Writ of Certiorari to the Ohio Supreme Court to review the judgment of that court, entered November 22, 2000, denying Petitioner's jurisdictional motion.

STATEMENT OF THE CASE

Petitioner is a civic activist and a Republican politician in a substantially Democratic city and has a history of promulgating adverse criticism of local officials. He was the endorsed Republican candidate for Congress in the Ninth Congressional District in November 1998. After the polls had opened on election day, the Toledo, Ohio police, based upon a complaint filed by a neighbor involved in a dispute with petitioner, arrested petitioner in view of a full complement of TV cameras. By noon, the local airwaves

were full of the pictures and sounds of the story that the local Republican candidate (Petitioner) had been arrested for stalking. Needless to say, petitioner lost the election.

Appellant was charged with menacing by stalking such neighbor and her family members, based upon actions allegedly occurring over several months. More particularly, Petitioner was alleged to have, *inter alia*, verbally abused the complainant by calling her names, writing offensive notes, placing junk on her property, putting paper on her trees, painting the side of her house, and videotaping her and her family.

A temporary protection order was issued which provided that petitioner was to "not abuse the complainant and the other family of household members named in this order by harming, attempting to harm, threatening, molesting,

following, stalking, bothering, harassing, annoying, contacting . . . them." This order was in the form of the standard category protection order in which the judge simply marked all of the boxes on the carbon form, despite the fact that many if not most of the orders were not applicable to the situation. Moreover, the preprinted order purported to require petitioner to stay more than 100 feet from the complainant, which would have required petitioner to move from his home, which is within 100 feet all the complainant's home. At the bench, after issuing the order, the judge indicated to trial counsel that he did not intend to require petitioner to move from his home.

Prior to a jury trial on the menacing by stalking charge, in January, 1999, additional charges were filed against petitioner in three separate cases alleging violations

of the temporary protection order (under the menacing by stalking charge), which cases were subsequently tried by jury. At the jury trial of the actual menacing by stalking charge, there was evidence that the complainant herself had initiated some abusive language directed to appellant. However, appellant was convicted of menacing and stalking and sentenced to 180 days in jail, with all but ten days suspended. Subsequently, petitioner was tried on the three alleged violations of the temporary protective order, the evidence centering substantially on petitioner's videotaping of the complainant. Petitioner was convicted of two violations of the protective order. At sentencing on the latter convictions, appellant was not given the opportunity to speak on his behalf and it was sentenced to a 180 day term of incarceration, followed by a 180 day term of house arrest, the

maximum periods of incarceration permitted.

Petitioner appealed to the Lucas County Court of Appeals, which on June 30, 2000, affirmed the trial court on three convictions. Petitioner then sought review in the Ohio Supreme Court, which on November 22, 2000, declined to hear the appeal.

REASONS FOR GRANTING THE PETITION

The carefully timed and orchestrated arrest of a candidate for political office on election morning, on the charges of the complainant (involved in a long-running dispute with the candidate over certain zoning and property use issues), should cause this court to view the petition with heightened interest. When the courts and officials, even at the most local level, aid and abet such actions, the very foundation of a democratic society is threatened. In this case, local officials justifying the election morning arrest of a political candidate from the minority party, simply ran roughshod over the Constitution. Space limitations herein preclude a thorough exposition of the constitutional deficiencies of the process afforded petitioner. However,

petitioner would respectfully call to this court's attention a few of the highlights in this respect.

1. Failure to Require Proof of Essential Elements of the Crime.

Petitioner was convicted of violating a temporary protection order which prohibited menacing by stalking. Thus the state had to prove both the substantive, underlying violation (menacing by stalking) and that the underlying behavior constituted a violation of a temporary protective order. The trial court found the underlying violation only by assuming two of the elements of the violation: recklessness and mental distress.

Petitioner was charged with a violation of Toledo Municipal Code § 523.05 which provides as follows:

> (1) no person by engaging in a pattern of conduct shall knowingly cause another to

> believe that the offender will cause physical harm to the other person or cause mental distress to the other person.
> (2) "mental distress" means any mental illness or condition that involves some temporary substantial incapacity or mental illness or condition that would normally require psychiatric treatment.

The testimony set forth by the state contained no evidence that petitioner threatened physical harm to the purported victims, or that the purported victims had perceived a threatened physical harm. Rather, the evidence tended to establish only some minimal (at best) mental or emotional effects. However, "mental distress" under the municipal ordinance requires more than just anger, irritation, or the like. Rather, it involves distress causing either "some temporary substantial incapacity" or "mental illness or condition that would normally require psychiatric treatment."

There was no evidence adduced at all involving substantial incapacity on the part of the alleged victims: no testimony of missed work, being laid up in bed, or the like, by the two alleged victims. The only testimony from the purported victims, one of whom was convicted of drug charges, involved emotional or mental upset. Moreover, the state never presented expert testimony as to whether the emotional or mental upset of the alleged victims amounted to "mental illness or condition that would normally require psychiatric treatment." Nor was there any testimony that any victim actually sought psychiatric treatment. It is self-evident that, at least as to the "mental illness or condition that would normally require psychiatric treatment" branch of the statute, lay testimony is insufficient to establish that element. The court, however, apparently assumed, with a complete absence

of testimony, that the victims were upset enough that it caused them to suffer "mental illness or condition that would normally require psychiatric treatment." Thus the court merely assumed proof of an essential element of the underlying violation.

The Court of Appeals stated that "it is the function of the trier of fact to determine whether victim has suffered mental distress as a result of the defendant's behavior. No expert testimony is required. No evidence that psychological treatment has been undertaking is necessary." The court cited ***State v. Tichon*** (1995), 102 Ohio App. 3d 758, 763, and ***State v. Schwab*** (1997), 119 Ohio App. 3d 463, 477, in support of its holding. However, neither case supports the court's holding. Those cases relied ultimately on the holding of the Ohio Supreme Court in ***Paugh v. Hanks*** (1983), 6

Ohio St. 3d 72, 80, 451 N.E.2d 759, which had nothing to do with the instant statute, which carefully spells out the level of mental distress required for conviction. Rather, ***Paugh*** was a common law intentional infliction of emotional distress case. In ***Paugh*** cases, there is indeed no requirement for expert testimony, for the tort does not require that the mental distress be a "condition that would normally require psychiatric treatment". But the statute does, and lay persons are simply not equipped to determine whether a condition would normally require psychiatric treatment.

Because the trial court did not require the State to prove an essential element of the crime, the conviction violates due process and should be overturned by this Court.

The court also assumed the "recklessness" element of the crime. The relevant section under which petitioner was

prosecuted, Ohio Revised Code § 2919.17, provides in relevant part as follows:

> "No person shall recklessly violate any terms of the protection order..."

The term "recklessly" is defined in Ohio Revised Code § 2901.22(C):

> A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.

The main evidence presented in regard to the temporary protection order violation is that, to protect himself against false claims made by the alleged victim, petitioner stood on his porch, on his property, in open view,

and videotaped the alleged victim. The temporary protection order in this case did not specifically cover such behavior, and was certainly not sufficiently explicit to constitute petitioner's behavior as a "reckless" violation of the protection order. The court, however, faced with a complete lack of evidence of recklessness, simply ignored that requirement and, by judicial fiat, convicted petitioner.

This Court announced in ***In re Winship***, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), that due process requires that the government prove each element of a crime beyond a reasonable doubt:

> "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." ***Winship*** at 364.

The Courts of Appeal have faithfully applied this command:

> "Because that charge was submitted under an instruction that permitted the jury to convict without requiring the government to prove all the elements of the offense, it would be a violation of the defendants' due process rights to permit such a verdict to stand." ***U.S. v. Palazzolo***, 71 F.3d 1233, *1238 (6th Cir. 1995).

The blatant failure by the trial court to require the State to prove all of the elements of the charged offenses merits review of this case.

2. Enforcement of the Temporary Restraining Order Was a Violation of Petitioner's Rights under the First Amendment, and Was an Unconstitutional Prior Restraint on Lawful Communications Protected by the First Amendment.

Probably a thousand times a day or more, courts across the land are issuing temporary restraining orders

(TRO's) prohibiting harassment, stalking, or other threatening behaviors by one individual toward another. Many of these orders are well-deserved and are properly limited in scope to prevent illegal or extreme behavior which threatens domestic tranquility. Increasingly, however, courts are utilizing these orders as mere shortcuts to avoid having to deal with complex disputes between people. As a result of the ease with which these orders are obtained, involving an almost-nonexistent burden of proof, and the often broad and subjective language in which they are framed, the alleged wrongdoers find themselves to be victims of too-easily obtained and too-broadly worded, subjective orders. Innocent behavior lands the victims of these orders in jail because some objectively innocent and non-threatening behavior "annoys" the complainant. While petitioner has no

statistics on how often this is occurring, if even a very small percentage of such TR0's are creating such a problem, thousands of people every year are themselves being victimized by these orders.

Such is the case in the present matter. Petitioner and his neighbor are involved in a long-running dispute. Additionally, petitioner had been the victim of harassment by the neighbor's teenage son. The complainant won the race to the courthouse, and, alleging a variety of harassing behaviors, obtained a temporary restraining order against petitioner. The order directed petitioner to refrain from, *inter alia*, "annoying" the complainant. To protect himself against further false accusations, and from harassment by the complainant's teenage son, petitioner began videotaping outside his house whenever both he and the complainant or

her son were outside. Petitioner also placed a mirror in his front yard angled such that a video camera from his house could continually monitor his and his neighbor's yard. Complainant didn't like (was "annoyed" by) these legal, non-threatening, defensive acts and related legal actions. So she went back to court to get petitioner thrown in jail, while Petitioner continuously sought help from the police. Notwithstanding the legality and objectively non-threatening character of the behavior, and the purely defensive purposes for activities (like videotaping) which were undertaken, the court allowed that behavior to be presented to the jury as a violation of the restraining order, because they "annoyed" the neighbor.'

In an admirable moment of candor, the State admitted before the Court of Appeals, that "the jury in the protective

order violation case indicated that the conviction was founded on the 'annoyance' prohibition". See opinion of Court of Appeals, p. 9.

In ***Thomas v. Collins*** (1945), 323 U.S. 516, 65 S. Ct. 315, the Supreme Court of the United States dealt with a Texas statute which required labor union organizers to obtain an organizer's card before soliciting membership. The court reversed the contempt citation of an organizer who solicited membership without a card: "We think a requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment."

Petitioner found himself in the same position as that labor union organizer. It cannot be seriously disputed that Petitioner had the right to take legal, non-threatening

measures to protect himself against further false accusations by his neighbor.

The guarantee of liberty is "incomplete" if "the state [is] free to interfere with those personal aspects of our lives which have no direct bearing on the ability of others to enjoy their liberty"). ***Richards v. Thurston***, 424 F.2d 1281, 1284-85 (1st Cir. 1970). The stalking statute at issue was applied to a situation where Petitioner engaged in nothing other than protected First Amendment activities. That the innocent, and even defensive, behavior (videotaping complainant for Petitioner's own protection) subjectively "annoyed" the complainant may be perfectly true. Some people are annoyed by almost everything. But to allow one person's subjective annoyance to constitute a criminal violation by another is truly frightening. If an individual who daily rides a

municipal bus frightens or annoys another passenger merely by virtue of his presence, may he be convicted of stalking?

In this hypothetical situation, the government could plausibly claim that the defendant, through repeated acts of annoyance (being present on the bus), has committed menacing by stalking. Further, the government could plausibly claim that the defendant consciously disregarded a substantial and unjustifiable risk that his conduct would have this result. Yet the defendant's conduct was not directed at anyone; that conduct consisted of nothing more than riding the bus.

This is not mere theoretical rhetoric: the major action alleged against Petitioner was that of videotaping the alleged victim, who is Petitioner's neighbor, not in the privacy of her home, but in the open and exposed area of her yard.

Furthermore, because Petitioner was as much a victim of the complainant's harassment as the complainant was of the petitioner's, videotaping her was the only way to protect himself against further false accusations. Certainly, in the circumstances in which petitioner found himself, the self-defense of act of videotaping potential confrontations between the alleged victim and himself was a legitimate exercise of his rights under the First Amendment. Furthermore, the fact that such an act, not only necessary for the protection of petitioner, but in no way inherently threatening, formed the major basis of the contempt conviction, demonstrates the basic overinclusiveness of the order in the first place. That is, complainant was subjectively "annoyed" by objectively unthreatening behavior, and it was upon this subjective annoyance that the state rested its case.

If this decision is permitted to stand, every neighborhood dispute may be expected to result in a rush to the courthouse, and the loser will be muzzled and held defenseless against his neighbor.

3. Adducing Evidence (by the State) Going Beyond the Scope of the Bill of Particulars

Because the additional charges at issue were so vague, petitioner demanded and was afforded a bill of particulars which offered somewhat more specificity in the charges. At trial, however, the state offered evidence far beyond the scope of the bill of particulars. "The function of a bill of particulars is to enable the accused to prepare for trial and to prevent surprise, and to this end the government is strictly limited to proving what it has set forth in it." ***United States v. Glaze***, 313 F.2d 757, *759 (2nd Cir. 1963), citing ***United***

States v. Murray, 297 F.2d 828, 819 (2nd Cir. 1961), cert. denied, 297 F.2d 812, 82 S.Ct. 845, 7 L.Ed.2d 794 (1962). "It is beyond cavil that a bill of particulars confines the Government's proof to the particulars supplied." ***United States v. Leonelli***, 428 F. Supp. 880, 882 (S.D.N.Y. 1977).

In ***United States v. Neff***, 212 F.2d 297 (3rd Cir. 1954), the court held that where the defense had been geared to testimony expected from witnesses revealed in government's original bill of particulars, the trial judge's failure to strike a supplemental bill of particulars, of which the defendants had been advised three days before trial, and which was filed on the day trial commenced, and to disallow testimony of witness listed in the bill, constituted prejudicial error.

The instant case represents an even more egregious error than in ***Neff***, since the State did not even attempt to file

a supplemental bill of particulars, but simply went outside the boundaries of the bill already filed, thus causing even greater surprise and prejudice.

4. Failure to Permit Allocution at Sentencing.

The cursory and deficient nature of the proceedings continued into sentencing, when petitioner was not offered an opportunity to allocute to the court. This Court has apparently never specifically held that failure to permit allocution at sentencing is a due process violation: "This Court has not directly determined whether or to what extent the concept of due process of law requires that a criminal defendant wishing to present evidence or argument presumably relevant to the issues involved in sentencing should be permitted to do so." ***McGautha v. California***, 402 U.S. 183, 218, 91 S.Ct. 1454, 1473, 28 L.Ed.2d 711 (1971).

Yet the practice has a rich history and has largely been respected by the courts, and it has been held by the lower courts to be of constitutional dimension. For example, in ***Ashe v. North Carolina***, 586 F.2d 334 (4th Cir.1978), cert. denied, 441 U.S. 966, 99 S.Ct. 2416, 60 L.Ed.2d 1072 (1979), the Court of Appeals held that the denial of a defendant's request to allocute to the state sentencing court was a denial of due process. 586 F.2d at 336. Likewise, in ***Boardman v. Estelle***, 957 F.2d 1523, 1529-30 (9th Cir. 1991), cert. denied, 506 U.S. 904, 113 S.Ct. 297, 121 L.Ed.2d 221 (1992), the Court of Appeals held in a habeas corpus appeal that the sentencing judge's denying a convicted defendant's affirmative request to allocute implicates constitutional due process, although amenable to harmless error analysis. Considering the minuscule burden, if any, on the courts and

on law enforcement, of allowing the defendant a few minutes of unsworn testimony, it would be entirely appropriate for this Court to declare the practice to be constitutionally required.

Of course, it is never possible to say with certainty what the effect of allocution would have been. In the instant case, however, the punishment meted out by the court was extraordinarily harsh, bordering on cruel and unusual punishment. In a case entirely devoid of evidence that petitioner ever threatened physical harm, and equally devoid of evidence that the complainant was threatened with or suffered "mental distress", as defined by the statute, petitioner was sentenced to six months in jail, followed by six months of electronic monitoring (house arrest). It certainly cannot be said with any confidence that the judge

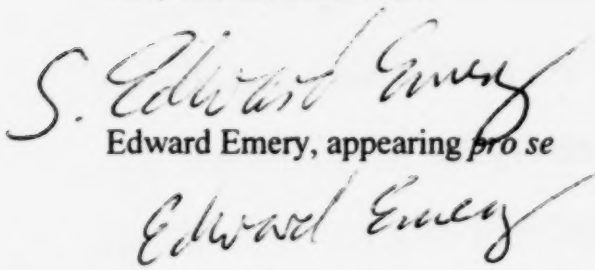
would not have ameliorated to some degree this harsh sentence, had he heard from the defendant.

One of the most important rights attaching to American citizenship is that all of redress of wrongs, whether at the hands of the government or a the hands of private parties. Obviously, the courts are key weapons in the protection of that right. But when the courts themselves act as nothing more than tools of vested political interests, that right is deeply threatened. Petitioner is just one small person, just one minor politician, in medium-size city in the Midwest, and life will go on whether or not he ever receives the process due him under the Constitution. But a rich opportunity exists in this case for this court to make a statement, that every defendant is entitled to every protection afforded to the citizens of this country.

CONCLUSION

Because of the compelling public interest in the matters described herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,



Edward Emery, appearing *pro se*

APPENDIX A

OPINION OF THE COURT OF APPEALS

IN THE COURT OF APPEALS OF LUCAS COUNTY

City of Toledo — Court of Appeals No. L-99-1067
L-99-1155

Appellee — Trial Court No. CRB-98-22528
CRB-98-23457
v. CRB-98-23458

Edward Emery

DECISION AND JUDGMENT ENTRY

Appellant — Decided: June 30, 2000

****

Susan L. Luxon and Sharon D. Gaich, for appellee.

George R. Royer, for appellant.

****

SHERCK, J. This appeal comes to us from the Toledo Municipal Court. There, following separate jury trials, appellant was convicted of one count of menacing by stalking and two counts of violating a protective order.

Because we conclude that both convictions were supported by the evidence and there were no prejudicial errors in either trial, we affirm.

Appellant, Edward Emery, and principal complainant, Debra Bennett, are feuding next door neighbors on Portsmouth Avenue in Toledo. The origins of their dispute is somewhat vague, but apparently dates to appellant's construction of a large masonry structure in his backyard which resembled a castle. While appellant apparently considered this edifice a work of art, his neighbors, including Debra Bennett, considered it a nuisance. The City of Toledo sided with the neighbors. After legal wrangling, the "castle" was dismantled and taken away.

If relations between these two neighbors had ever been cordial, they were not so following the removal of the castle. Bennett reported that appellant began referring to her as a cocaine and heroin addict, a "whore" and "prostitute." Trash was dumped in the Bennett's front yard, a tree "toilet papered," and political signs stolen. Bennett testified at trial that in the three years prior to her complaint, she had forty-one flat tires, the result of nails or slashing. She reported damage to motion sensor security lights six times during the same period. Appellant brought numerous juvenile complaints against Bennett's teenage son and multiple lawsuits against Bennett herself. None of these actions proved meritorious.

At some point, appellant acquired a videotape camera and began to videotape Bennett, her two children, relatives,

and visitors to her home. He also installed mirrors on the side of his house, which faced the Bennett's house.

On April 18, 1998, Bennett found a note inserted into the morning newspaper on her front porch. The note read, "pay the Piper! for your sins what rights do you've to destroy others property work of art? Go to the zoo west end newsboys U.T. & friends." The note was attached to a section of the Toledo Blade newspaper with a picture of a large sculpture being installed at the University of Toledo campus. An arrow was drawn to the picture in Green ink; the same color ink used in the note.

On November 3, 1998, Debra Bennett filed a complaint accusing appellant of menacing by stalking. Concurrently, Bennett requested and was granted a temporary protective order directing appellant to refrain from, inter alia,

"* * * harming, attempting to harm, threatening, molesting, following, stalking, bothering, harassing, annoying, [or] contacting * * * " Bennett or her children.

On November 11, 1998 and November 16, 1998, appellant was again videotaping Bennett and her children. Separate charges were brought, accusing appellant of violating the protective order.

The stalking offense and the protective order violations were tried separately before separate jurys, resulting in appellant's conviction for menacing by stalking and for two counts of violating a protective order. On the stalking conviction, appellant was sentenced to 180 days incarceration, with all but 10 days suspended and probation imposed. On the protective order violations, appellant was sentenced to 180 days incarceration for the first count and a

consecutive 180 days electronic monitoring (house arrest) on the second count.

Appellant now appeals these convictions and sentences, setting forth sixteen assignments of error.[1]

I.

In his first, forth and seventh assignments of error, appellant challenges both the weight and sufficiency of the evidence upon which he was convicted. In Assignment of Error No. Fifteen, he indirectly challenges the sufficiency of the evidence in the context of an overruled Crim. R. 29 motion.

In a criminal context, a verdict or finding may be overturned on appeal if it is either against the manifest weight of the evidence or because there is an insufficiency of evidence. In the former, the appeals court acts as a

"thirteenth juror" to determine whether the trier of fact lost its way and created such a manifest miscarriage of justice that the conviction must be overturned and a new trial ordered. State v. Thompkins (1997), 78 Ohio St. 3d 380, 387. In the latter, the court must determine whether the evidence submitted is legally sufficient to support all the elements of the offense charged. Id. at 386-387. Specifically, whether the state has presented evidence which, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The test is, viewing the evidence in a light most favorable to the prosecution, could any rational trier of fact have found the essential elements of the crime proven beyond a reasonable doubt. Id. at 390 (Cook, J. concurring); State v. Jenks (1991), 61 Ohio St. 3d 259, paragraph two of

the syllabus. See, also, State v. Eley (1978), 56 Ohio St. 2d 169; State v. Barnes (1986), 25 Ohio St. 3d 203.

With respect to sufficiency of the evidence in the menacing by stalking case, appellant was convicted of violating Toledo Municipal Code 523.05 which is identical to former R.C. 2903.211. The ordinance provides that:

> "(A) No person by engaging in a pattern of conduct shall knowingly caused another to believe that the offender will cause physical harm to the other person or cause mental distress to the other person.
>
> "(B) Whoever violates this section is guilty of menacing by stalking, a misdemeanor of the first degree. If the offender previously has been convicted of or pleaded guilty to a violation of this section involving the same person who is the victim of the current offense, menacing by stalking is a felony of the fourth degree.

"(C) As used in this section:

"(1) 'pattern of conduct' means two or more actions or incidents closely related in time, whether or not there has been a prior conviction based on any of those actions or incidents.

"(2) 'mental distress' means any mental illness or condition that involves some temporary substantial incapacity or mental illness or condition that would normally require psychiatric treatment."

Appellant asserts that the record is devoid of any evidence that he ever directly threatened the Bennetts with physical harm or that his behavior was such that the Bennetts would have suffered mental distress to the extent that professional treatment be needed.

Direct threats of physical harm are unnecessary to establish a violation of Toledo Municipal Code 533.05/R.C. 2903.11. It is sufficient that the accused exhibit a pattern of

behavior with an awareness that his conduct will likely cause another to believe that the defendant will cause physical harm. See Still v. Still (April 23, 1999), Montgomery App. No. 17416, unreported. Moreover, it is the function of the trier of fact to determine whether a victim has suffered mental distress as the result of a defendant's behavior. No expert testimony is required. No evidence that psychological treatment has been undertaken is necessary. State v. Tichon (1995), 102 Ohio App. 3d 758, 763; State v. Schwab (1997), 119 Ohio App. 3d 463, 477.

In this matter, there was evidence by which a jury could have concluded that over a period of years appellant engaged in an ever escalating pattern of vandalism and harassment and that such behavior might reasonably cause the Bennetts to fear that the next step would be physical

harm. Similarly, the jury could have concluded that this behavior terrorized the Bennetts sufficiently to satisfy the "mental distress" element of the ordinance. In either event, there was sufficient evidence to sustain all of the elements of the offense. Neither was the jury verdict against the manifest weight of the evidence. Accordingly, appellant's first and seventh assignments of error are not well taken.

Appellant also complains that there was an insufficiency of evidence to sustain the jury's verdict of his protective order violation conviction. R.C. 2929.17 prohibits anyone from recklessly violating the terms of the protective order. The protective order directed appellant to abstain from, "following * * * bothering, harassing, anoying, [or] contacting * * * " Debra Bennett or her children. Within a few days of the issuance of this order, the unrefuted evidence

was that appellant was again videotaping the Bennett children. This occurred, even though videotaping was one of the specific behaviors that Debra Bennett complained of in the original complaint upon which the protective order was issued. On these counts, the jury could have reasonably concluded that appellant had specific notice that videotaping constituted an annoyance or harassment of the victims and, nevertheless, chose to continue this behavior. Consequently, there was neither an insufficiency of the evidence in the protective order trial, nor was the verdict against the manifest weight of the evidence. Accordingly, appellant's fourth assignment of error is not well-taken.

In his fifteenth assignment of error, appellant also complains that the trial court erred "* * * at various points in both trials" in denying his motions for directed verdict. We

have identified only one such motion on the record, at the close of the state's case in the protective order violation trial.

If reasonable minds can differ as to whether the state has proven each element of an offense beyond a reasonable doubt, the court must overrule a motion pursuant to Crim. R. 29. State v. Bridgeman (1978), 55 Ohio St. 2d 261, syllabus. Our view coincides with that of the trial court that the state met its burden. Accordingly, appellant's fifteenth assignment of error is found not well-taken.

II.

In assignments of error Nos. Three, Ten, Twelve, Thirteen, Fourteen and in his first assignment of error No. Nine, appellant complains of various evidentiary rulings in both trials.

The admission or exclusion of evidence at trial rests in the sound discretion of the trial court and will not be reversed absent an abuse of the discretion. State v. Morales (1987), 32 Ohio St. 3d 252, 257. An abuse of discretion is more than an error of law or of judgment, the term connotes that the court's attitude is arbitrary, unreasonable or unconscionable. State v. Long (1978), 53 Ohio St. 2d 91, 98.

In his third assignment of error, appellant asserts that the trial court erred in admitting the "go to the zoo" document that Debra Bennett found in her newspaper. Appellant argues that Bennett was incompetent to identify the handwriting in the zoo document as his. Appellant points to the testimony of his handwriting "expert" that a lay person could not conclusively identify a handwriting sample.

According to appellant, without expert testimony there was no foundation laid to introduce the document.

The "zoo" letter was admissible if for no other reason than it constituted evidence of a pattern of conduct which is an element of the offense. As to Debra Bennett's testimony that she recognized the writing on the note as appellant's, this goes to weight, not admissibility. Also admitted were unrefuted samples of appellant's writing by which the jury could compare documents and reach its own conclusion. We cannot say that the court's decision to admit the "zoo" note or Debra Bennett's testimony about it constituted an abuse of discretion. Accordingly, appellant's third assignment of error is not well-taken.

Appellant argues in his tenth assignment of error that he should have been permitted to present evidence that,

following the issuance of the protective order, he was told that the court had no intention of enforcing its order that he stay one hundred feet from the Bennetts.

Appellee responds that this is a moot argument because the jury in the protective order violation case indicated that the conviction was founded on the "annoyance" prohibition, not the "100 feet" proscription.

The record does not contain the special interrogatory to which appellee refers. However, neither does it contain the ruling of which appellant complains. Absent some record of such ruling, we must presume the regularity of the proceedings. State v. Nichols (1997), 122 Ohio App. 3d 631, 634, citing Knapp v. Edwards Laboratories (1980), 61 Ohio St. 2d 197, 199. Accordingly, appellant's tenth assignment of error is not well taken.

In his twelfth assignment of error, appellant insists that in the protective order trial, the court should not have permitted Christopher Bennett to testify to appellant's pattern of behavior prior to the issuance of the protective order. Anything prior to the order is irrelevant, appellant argues.

We disagree. Although prior conduct may not form the basis of a violation of a protective order, testimony concerning a prior pattern of behavior out of which the need for a protective order arose may be contextually important in examining behavior subsequent to the order. As such, admission of the testimony of which appellant complains was within the trial court's discretion. Appellant's twelfth assignment of error is not well taken.

Appellant's thirteenth assignment of error concerns Debra Bennett's testimony that her children felt threatened

and annoyed by appellant's conduct. Appellant contends that such testimony was without personal knowledge or based on hearsay.

Even if the court's decision to admit the testimony complained of was erroneous, it was harmless. At the same trial, both Bennett children testified that they were threatened and annoyed by appellant's behavior. Moreover, given the abuse of discretion standard of review for this ruling, we cannot say that the trial court's decision was erroneous. Accordingly, appellant's thirteenth assignment of error is not well taken.

In his fourteenth assignment of error, appellant complains that Debra Bennett should not have been permitted to testify about her flat tires because she did not actually witness appellant vandalize them.

Even had appellant objected to this testimony, it would have been admissible. Debra Bennett's testimony was that she had suffered forty-one flat tires within three years is a factual observation of which she had personal knowledge. It is circumstantial evidence of vandalism. As for Bennett's belief that appellant was responsible, again this goes to weight, not admissibility. Appellant's fourteenth assignment of error is not well-taken.

In his first assignment of error No. Nine, appellant, citing State v. Collett (1944), 44 Ohio Law Abs. 225, 58 NE 2d 417, contends that the state should have restricted its proof to the information set forth in the "indictment" and the bill of particulars.

If Collette stands for anything relevant to this case, it is that an accused is entitled to sufficient notice of the

offenses of which is charged. We read nothing in the case suggesting that the state is limited by a bill of particulars with regard to the evidence it presents in support of the particulars. Accordingly, appellant's first assignment of error No. Nine is not well taken.

III.

In his Assignments of Error numbers Two, Five, Six, and Eight, appellant contends that the charges against him and the sentence he received violate certain of his constitutional rights.

In his second assignment of error, although appellant concedes that the menacing by stalking ordinance and the temporary protective order statute are constitutional on their face, he contends that as applied to him they violate his right of free speech and privacy. In the stalking case, appellant

characterizes his confrontation with the Bennetts as "reciprocal [] verbal altercations" which never constituted threats of a physical nature or involved physical harm. As for his videotaping of the Bennetts and their guests, appellant insists that he has an absolute right to videotape anyone, anytime, in any public place.

With respect to the violation of the temporary protective order, appellant asserts that he was only exercising his constitutional right to videotape people in public and that this right supersedes any "annoyance" factor that the Bennetts might have suffered.

Appellant chooses to focus on his activities with the video camera as innocuous and offers several examples in which society condones or even encourages videotaping in public. Appellants suggest that the camera's role in solving

and preventing crime and disseminating news and information is deserving of protection, but offers no authority for the absolute constitutional protection he claims for his camera use. Appellant is not a member of the press, nor has he comes forward (after what, from the testimony, must have been scores of hours of taping) with evidence of any criminal activity in which the Bennetts were involved. More importantly, videotaping is only one activity in which appellant engaged that made up the pattern of behavior which the jury deemed to be stalking. Independent and unimpeached witnesses testified to observing appellant engaged in an obscenity laced screaming harangue at Debra Bennett's son in which appellant referred to the fifteen-year old mother as a "whore or prostitute." Another witness saw appellant come onto the Bennett property to "toilet paper" a

tree. If the testimony of the Bennett family is credited, encounters like these were frequent and occurred over a prolonged period of time. Also, there is the "pay the Piper for your sins" note. Whether or not the handwriting on this note is traceable to appellant, the message, as it stands in the context of events, is sufficient to permit a reasonable trier of fact to conclude that appellant came onto Bennett's property and inserted into their newspaper a message which a reasonable person might conclude was threatening.

These facts are remarkably similar to those in State v. Tichon, supra. That case also involved a dispute between neighbors, profanity infested "hollering and screening," and defendant's photographing of his neighbors. The trial court allowed, over objection, evidence of the defendant's incessant camera use which was directed at his victims. The

Summit County Court of Appeals approved the admission of such evidence noting that such, "* * * evidence * * * can assist the jury in understanding that a defendant's otherwise innocent appearing acts, when put in the context of previous contacts he has had with the victim, may be knowing attempts to cause mental distress." Id. at 768, quoting State v. Bilder (Dec. 30, 1994), Summit App. No. 16754, unreported.

As we concluded in our discussion of appellant's fourth assignment of error, videotaping was but one part of a behavioral pattern which caused the victims to be fearful or distressed. While appellant, or any videographer, may have some liberty interest in taking pictures, such rights do not necessarily supersede an individual's right to be left alone in

the privacy of his or her own home. See Cary v. Brown (1980), 447 U.S. 455, 477.

With respect to the temporary protective order violation, the order was issued on the filing of Debra Bennett's complaint against appellant. We reiterate that Debra Bennett's complaint specifically mentioned appellant's obsessive videotaping as one of the annoyances he inflicted on her family. Given this, appellant can hardly be heard to complain that he was not aware that videotaping Debra Bennett's minor children would cause annoyance. He, therefore, despite having notice, knowingly engaged in activity which he had notice would annoy the Bennetts, even though he had been specifically ordered not to annoy them. Accordingly, appellant's second assignment of error is not well taken.

In his fifth assignment of error, appellant contends that he was denied due process because he was denied an opportunity to speak at one or both of his sentencing hearings and was denied an opportunity to be heard on bail or stay of sentence pending appeal.

While it is true that Crim. R. 32 directs that prior to sentencing, the trial court shall address the defendant and offer him or her the opportunity to make a statement or offer information in mitigation of punishment, the failure to do so is not prejudicial error when, like here, defense council spoke extensively on the defendant's behalf prior to sentencing. State v. Smelcer (1993), 89 Ohio App. 3d 115, 128. Moreover, during the sentencing hearing, appellant failed to object to this omission thereby waving error. State v. Peters (Aug. 22, 1990), Lorain App. No. 89CA004733, unreported;

State v. Peagler (1996), 76 Ohio St. 3d 496, 499. Accordingly, appellant's fifth assignment of error is not well taken.

In his sixth assignment of error, appellant contends that his sentences are excessive, constituting a violation of the prohibition in both the Ohio and United States Constitution against cruel and unusual punishment.

The eighth amendment to the Constitution of the United States and Section 9, Article I, of the Ohio Constitution both prohibit "cruel and unusual" punishment. Violations of these provisions are rare. State v. Wetibrecht (1999), 86 Ohio St. 3d 368, 370-371. Violations of the provision have been found only where the sanctions imposed are, " * * * shocking to any reasonable person" or " * * * so greatly disproportionate to the offense as to shock the sense

of the community." Id. quoting McDougle v. Maxwell (1964), 1 Ohio St. 2d 68, 70.

Here, appellant argues the sentences he received were disproportionate for merely pointing a video camera at someone. As discussed above, videotaping is only a single act of many which the jury concluded constituted menacing by stalking. With respect to the protective order violation, appellant knew videotaping was annoying to the Bennetts and was, therefore, prohibited by the order. This was willful violation of a lawful court order and, as such, the sentence imposed was not disproportionate in any sense. Accordingly, appellant's sixth assignment of error is not well taken.

Appellant, in his eighth assignment of error, asserts that his conviction for stalking and his conviction for violating the protective order constitute punishment for the

same acts and, therefore, violate constitutional double jeopardy prohibitions. Appellant cites no authority for this assignment of error.

While it is true that both the Ohio Constitution and United States Constitution forbid someone from being held twice accountable for the same act, the offenses of which upheld was convicted were different acts, performed at different times, in violation of different statutes. This assignment of error is not well-taken.

In his second assignment of error No. Nine, appellant insists that he was prejudiced in the protective order violation case when the trial court permitted the state to amend its complaint. The amendment changed the number of the statute under which the complaint was brought from "TMC 537.20" to "R.C. 2919.27." Such an amendment is

permissible under Crim. R. 7(D). Accordingly, appellant's second assignment of error number nine is not well-taken.

Appellant's remaining assignment of error concerns a pro se motion to disqualify his trial judge in the protection order violation case. This motion was filed on April 14, 1999, and, following a hearing, denied by the presiding judge of the Lucas County Common Pleas Court on May 19, 1999. Appellant argues that during the pendency of this motion, the trial court was without jurisdiction and, as a result, the court's acceptance of the state's motion to amend and the rejection of several in limine motions by the defendant were void.

While there is some authority to support appellants position, see Cuyahoga County Board of Mental Retardation v. Association (1975), 47 Ohio App. 2d 28 (relating to

common pleas judges), we believe that the better view is expressed in Rife v. Morgan (1995), 106 Ohio App. 3d 843, 849, which held that the pendency of an affidavit of prejudice does not automatically divest the trial court of power to act, even on substantive matters. The caveat to the court, however, is that if it does undertake to act on substantive matters, it risks the proceedings being held a nullity if disqualification is ordered. Id. at 850. In this matter, appellant's pro se motion to disqualify the trial judge was found not well-taken; therefore, the court's decisions and orders issued during the pendency of the motion remain undisturbed. Accordingly, appellant's eleventh assignment of error is not well-taken.

Upon consideration whereof, the judgments of the Toledo Municipal Court are affirmed. Costs to appellant.

JUDGMENT AFFIRMED.

Toledo v. Emery
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A certified copy of this entry shall constitute the mandate pursuant to App. R. 27. See, also, 6th Dist. Loc. App. R. 4, amended 1/1/98.

Peter M. Handwork, J.

Melvin L. Resnick, J.

James R. Sherck

1.Appellant has denominated these assignments of error as one through fifteen, but has then designated two of these as assignment of error "nine." See Appendix.

APPENDIX B:

ORDER OF THE SUPREME COURT OF OHIO

THE SUPREME COURT OF OHIO

[FILED NOV 22, 2000
MARCIA J, MENGEL, CLERK
SUPREME COURT OF OHIO]

City of Toledo, : Case No. 00-1480
Appellee, :

ENTRY

v. :

Edward Emery, :
Appellant :

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40.00, paid by George R. Royer, Esq.

(Lucas County Court of Appeals; No. L991155)

(S)
THOMAS J. MOYER
Chief Justice